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In the Supreme Court of the United States

OCTOBER TERM, 1993

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court properly entertained this suit challenging the policies of the Immigration and Naturalization Service (INS) for granting and denying adjustment of status under the legalization program established by 8 U.S.C. 1255a, notwithstanding 8 U.S.C. 1255a(f), which provides an exclusive means of review in the courts of appeals for denials of adjustment of status.

2. Whether 8 U.S.C. 1255a which requires all applications for adjustment of status to be filed before a specified deadline, bars the district courts from ordering INS to extend that deadline.

3. Whether organizations designated by INS to receive applications for relief under 8 U.S.C. 1255a have standing in their own right to challenge INS's interpretation of the eligibility requirements under 8 U.S.C. 1255a(a).

4. Whether individuals who failed during the period before 1982 to comply with 8 U.S.C. 1305 (1976), which required aliens to register with INS annually and notify INS quarterly of their address, had an unlawful status that was "known to the government" as of January 1, 1982, for purposes of 8 U.S.C. 1255a(a)(2)(B).

5. Whether INS violated the equal protection component of the Due Process Clause in implementing the statutory distinction between aliens whose lawful status "expired * * * through the passage of time" and those whose status was otherwise unlawful, 8 U.S.C. 1255a(a)(2)(B).

PARTIES TO THE PROCEEDING

Petitioners are the Immigration and Naturalization Service (INS); Chris Sale, Acting Commissioner of INS; Janet Reno, Attorney General of the United States; and the United States Department of State.

Respondents are the Legalization Assistance Project of the Los Angeles County Federation of Labor (AFL-CIO); Travelers and Immigrants Aid of Chicago; Hermandad Mexicana Nacional; One Stop Immigration; International Institute (San Francisco); International Institute (East Bay); Washington Association of Churches; John Does 1-4; and Jane Doe 1.*

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* The caption of the case in the court of appeals listed five additional entities (American G.I. Forum; United California Mexican-American Association; African Community and Information Center, Inc.; Chinese American Citizens Alliance; and Coalition for Fair Immigration Reform, Los Angeles) that were dismissed from the case by the district court. See App., *infra*, 52a n.4. Because those entities did not appeal their dismissal to the court of appeals, they are not parties to the proceeding in this Court.

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v.

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 976 F.2d 1198. The orders of the district court (App., *infra*, 40a-53a, 54a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1992. A petition for rehearing was

denied on February 10, 1993. App., *infra*, 66a-69a. On April 21, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Sections 1255a(a) and 1255a(f) of Title 8, United States Code, are set out in the Appendix, *infra*, 70a-75a.

2. Paragraphs (b)(3), (11), and (12) of 8 C.F.R. 245a.2 are set out in the Appendix, *infra*, 75a-76a.

STATEMENT

1. This case arises out of the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA), which allowed certain aliens unlawfully present in the United States to adjust their status to that of an alien lawfully admitted for temporary residence. 8 U.S.C. 1255a; see generally *Reno* v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993), slip op. 1-2. In particular, this case involves two subdivisions of Section 1255a: the provision in 8 U.S.C. 1255a(a)(2)(A) limiting relief to individuals who had "resided continuously in the United States in an unlawful status since [January 1, 1982]"; and the provision in 8 U.S.C. 1255a(a)(2)(B) limiting relief for nonimmigrants to individuals whose "period of authorized stay * * * expired before [January 1, 1982] through the passage of time," unless their "unlawful status was known to the Government as of [January 1, 1982]."

2. Respondents are several individuals and organizations who in 1988 filed this suit in the United States District Court for the Western District of Washington challenging on statutory and constitutional grounds the interpretation and implementation of 8 U.S.C. 1255a(a)(2)(A) and (B) by the Immigration and Naturalization Service (INS). The district court granted injunctive and declaratory relief in favor of respondents. App., *infra*, 40a-53a.

3. The court of appeals affirmed the district court's grant of relief. App., *infra*, 1a-39a. For purposes of this certiorari petition, five separate holdings of the court of appeals are relevant.

First, the court of appeals concluded that it was proper for the district court to entertain this suit notwithstanding 8 U.S.C. 1255a(f), which provides for exclusive judicial review in the courts of appeals of any "determination respecting an application" for relief under Section 1255a. The court relied on its prior decision in *Catholic Social Services, Inc.* v. *Thornburgh*, 956 F.2d 914 (1992) (*CSS I*), rev'd *sub nom. Reno* v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993) (*CSS II*). App., *infra*, 5a-6a. The court also rejected INS's argument that the district court should not have considered respondents' claims without requiring individual applicants to exhaust administrative remedies. *Id.* at 7a-9a.

Second, the court concluded that it was appropriate to extend the application deadline for individuals who had not filed applications in a timely manner due to their belief that they would not have been eligible for relief under INS's interpretation of the eligibility requirements. Like the first holding, that conclusion rested on the court's prior decision in *CSS I*. App., *infra*, 36a-37a.

Third, the court concluded that the organizational respondents have standing in their own right to pursue this action. App., *infra*, 9a-11a. The court reasoned that "INS regulations for eligibility criteria caused harm to the organizations by draining organizational resources and impairing their ability to assist and counsel nonimmigrants," and that "[t]he [respondent] organizations fall squarely within the zone of interests protected by IRCA." *Id.* at 10a.

Fourth, the court concluded that it was appropriate to entertain and resolve a claim that a group referred to as the "Section 265 claimants" had an unlawful status that was "known to the Government" in 1982 for purposes of 8 U.S.C. 1255a(a)(2)(B). App., *infra*, 14a-20a. That group includes individuals who failed to register with INS each year and notify the agency of their address at the end of each three-month period, as required by the former Section 265 of the Immigration and Nationality Act, 8 U.S.C. 1305 (1976). The court rejected the government's argument that the court should not entertain that claim because the government had not yet determined in what circumstances failure to comply with Section 265 rendered an alien's status "unlawful" and "known to the Government." App., *infra*, 16a-18a. On the merits, the court resolved those issues in favor of respondents. *Id.* at 20a-22a.

Fifth, the court concluded that INS regulations implementing the distinction in 8 U.S.C. 1255a(a)(2)(B) between aliens whose once-lawful status expired "through the passage of time" and those whose status was unlawful for other reasons (who must demonstrate that their unlawful status was "known to the Government") violated "the equal protection clause of the Fifth Amendment [*sic*]."

App., *infra*, 27a. In substance, the regulations established a general rule allowing relief for individuals who could prove that their unlawful status was known to the government. 8 C.F.R. 245a.2(b)(3). The regulations did not, however, require individuals who had held "duration of status" visas that expired by their own terms before January 1, 1982, to meet that burden of proof, because the authorized stay of those aliens ended automatically "through the passage of time" (within the meaning of 8 U.S.C. 1255(a)(2)(B)) when they remained beyond the period permitted by their visas. See 8 C.F.R. 245a.2(b)(11) and (12). The court acknowledged that the regulations must be sustained "unless they are wholly irrational," App., *infra*, 27a (brackets and internal quotation marks omitted), but it adopted the district court's conclusion that there was "no rational basis between the two groups to justify * * * different proof requirements." *Id.* at 28a. The court omitted any mention of the underlying statutory distinction between nonimmigrants whose lawful status expired "through the passage of time" and those whose status became unlawful in other ways, and relegated its analysis of the rationality of the process to a series of footnotes. *Id.* at 28a-29a nn.27-29.

4. The government filed a petition for rehearing, with a suggestion of rehearing en banc, requesting that the court of appeals hold the case pending this Court's disposition of the *CSS* case. The petition and suggestion were denied without opinion on February 10, 1993. App., *infra*, 66a-69a.

REASONS FOR GRANTING THE PETITION

1. The first two questions presented in this case—which concern the propriety of the district court's entertaining of respondents' claims and its extension

of the application deadline—are substantially identical to the questions presented to this Court in *Reno* v. *Catholic Social Services Inc.*, No. 91-1826 (June 18, 1993) (*CSS II*). Although the opinion of the Court in *CSS II* did not accept the government's arguments in the precise form in which they were submitted, the Court vacated the judgment of the Ninth Circuit on the grounds (which it found to be fairly included in our submission, slip op. 13 n.8) that the claims of individual applicants were not yet ripe for review, and that when they become ripe, the exclusive statutory review procedures in 8 U.S.C. 1255a(f) would have to be followed. See *CSS II*, slip op. 13-17. The Court also stated that it "would almost surely interpret" 8 U.S.C. 1255a(f)(2) to prevent aliens from circumventing the application deadline by filing a suit in anticipation of the denial of their applications as untimely. Slip op. 16 n.20. The Court's decision in *CSS II* casts considerable doubt on the Ninth Circuit's holding in this case—which relied on the Ninth Circuit's now-vacated decision in *CSS I*—that the district court could entertain respondents' claims and extend the application deadline. Accordingly, as it did in *Ayuda, Inc.* v. *Reno*, No. 91-1924 (June 28, 1993), with respect to the D.C. Circuit's decision involving similar claims, the Court should vacate the judgment of the court of appeals and remand the case for further consideration in light of *CSS II*.

2. The court of appeals' conclusion that the organizational respondents have standing was not based on the theory that they may challenge INS's legalization actions as representatives of their members. Compare *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Rather,

the court of appeals' holding rested solely on the organizational respondents' assertion that the government's interpretation of IRCA "drain[ed] organizational resources and impair[ed] their ability to assist and counsel nonimmigrants," and on the court's conclusion that such harm to the organizations themselves "fall[s] squarely within the zone of interests protected by IRCA." App., *infra*, 10a.[1]

The court of appeals' holding that organizations that assist aliens in applying for legalization have a cognizable interest—independent of that of the aliens themselves—in challenging interpretations of IRCA that affect only the eligibility of individual aliens is clearly wrong. The organizations are not within the zone of interests protected by the substantive eligibility criteria for legalization or the provisions governing the evidence individual aliens must produce to establish their eligibility. See generally *Air Courier Conference* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523-531 (1991); *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990). The organizations therefore have no independent cause of action under the APA to challenge INS's interpretation of IRCA on those subjects, any more than a lawyer has independent standing to challenge substantive or procedural rulings of an agency that may affect the lawyer's clients.

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[1] Because the court of appeals held that the organizations have standing without regard to the standing of individuals, this Court's holding in *CSS II* that district courts could not entertain challenges by individuals (other than individuals who were "front-desked" (see note 3, *infra*)) would not directly dispose of this aspect of the decision of the court of appeals. Nonetheless, as we explain below, we believe *CSS II* significantly undermines the court of appeals' analysis.

The Ninth Circuit's treatment of the organizational standing question also is in substantial tension with the analysis of the same issue by the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1339 (1989) (*Ayuda I*), vacated on other grounds, 498 U.S. 1117 (1991). In that case, the D.C. Circuit reasoned that "Congress, at most, intended the [organizations seeking standing] to act as intermediaries, not litigating ombudsmen. And even if the [organizations] are thought of as agents for the aliens, we doubt that Congress intended the agents to have broader rights to seek judicial review than do the principals." 880 F.2d at 1339.[2] Under the reasoning of *Ayuda I*, it seems most unlikely that the organizational respondents would have standing to sue in this case.

In our view, however, there is no need for plenary review of the organizational standing question at this time. The decision of this Court in *CSS II* indicates that the district court would not be entitled to grant relief either to individuals who filed applications or to individuals who chose not to file applications because of their belief that their applications would be denied.[3] It therefore would not be appropriate to

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[2] Although this Court vacated *Ayuda I* in light of its decision in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, the D.C. Circuit reaffirmed its opinion on remand, 948 F.2d 742 (1991) (*Ayuda II*). To be sure, the judgment in *Ayuda II* in turn was vacated by this Court after its decision in *CSS II*, see *Ayuda, Inc.* v. *Reno*, No. 91-1924 (June 28, 1993), but there is no reason to believe that this Court's decision in the government's favor in *CSS II* will lead the D.C. Circuit to retreat from its analysis of the standing question.

[3] The Court did hold that district courts may entertain suits by individuals who were "front-desked"—*i.e.*, individuals

recognize standing on the part of the organizational respondents to seek injunctive or other equitable relief that would redound principally to the benefit of such aliens. For as the D.C. Circuit reasoned in *Ayuda I*, even if we assume arguendo that organizations in some circumstances might have independent standing to sue under IRCA, Congress would not have intended them to have broader rights to sue than the aliens themselves. At the very least, that feature of this case weighs heavily against granting equitable relief for the benefit of individual aliens who do not have ripe claims for judicial review under *CSS II*. Cf. *CSS II*, slip op. 13-14. Accordingly, we believe that the appropriate course would be for the court of appeals to reconsider the organizational standing portion of its decision in light of this Court's analysis in *CSS II*. If the court of appeals adheres to its conclusion on remand, review in this Court might be warranted at that time.

3. As we explained in our supplemental brief in *Ayuda, Inc.* v. *Reno*, No. 91-1924 [hereinafter *Ayuda* Gov't Supp. Br.], the Associate Commissioner for Examinations in INS issued a formal decision on June 11, 1993, in a case styled *Matter of H*, which determines how INS plans to apply 8 U.S.C. 1255a to the Section 265 claimants. See *Ayuda* Gov't Supp. Br. 1a-7a (reproducing Associate Commissioner's de-

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whose applications were not accepted for filing because the applications on their face showed that the applicants were statutorily ineligible. See *CSS II*, slip op. 17-21. The record in this case as it now stands does not indicate that any individual respondents (or individual aliens that respondents claim to represent) were "front-desked" as that term is used in the *CSS II* opinion.

cision in *Matter of H*).[4] Because the Attorney General is authorized to administer the immigration laws, her interpretation of IRCA (and of the Immigration and Nationality Act as a whole) is entitled to substantial deference, and is controlling if it is reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Because the Attorney General has designated the Associate Commissioner to provide the "single level of administrative appellate review" permitted by 8 U.S.C. 1255a(f)(3) (see 8 C.F.R. 103.1(f)(2)(xxvii), 245a.2(p)), the Associate Commissioner's decision represents the final Executive Branch interpretation that is entitled to deference for purposes of this case. Because the court of appeals resolved the questions concerning the Section 265 claimants without an opportuniy to consider the Associate Commissioner's final interpretation of the relevant statutory provisions, it is possible that the court would reach a different reading of Section 1255a if it reexamined the issues in light of that interpretation.[5] Accordingly, we believe it would be appropriate for the lower court to reconsider these issues in light of *Matter of H*. Cf. *City of Chicago* v. *Environmental Defense Fund*, 113 S. Ct.

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[4] We have provided counsel for respondents with a copy of our supplemental brief in *Ayuda*.

[5] We note that the order upheld by the Ninth Circuit was designed to cover the activities of INS nationwide, even though the district court below was aware that the district court in the *Ayuda* case was considering the same question of statutory interpretation. App., *infra*, 58a-60a (discussing nationwide character of relief), 42a-44a (discussing interpretation of Act by district court in *Ayuda*).

486 (1992) (vacating judgment of court of appeals and remanding for reconsideration in light of subsequent administrative interpretation).

4. Finally, the court of appeals erred in holding that INS deprived respondents of equal protection in its application of the statutory distinction between individuals whose unlawful status arose "through the passage of time" and those whose status became unlawful in other ways. The language of 8 U.S.C. 1255a(a)(2)(B) makes relief available to two separate classes of nonimmigrant aliens: those whose "period of authorized stay * * * expired before [January 1, 1982] through the passage of time," and those whose "unlawful status was known to the Government as of [January 1, 1982]." Hence, it is plain that Congress did not intend to require aliens whose lawful stay expired "through the passage of time" to demonstrate further that their unlawful status had been known to the government.

INS implemented 8 U.S.C. 1255a(a)(2)(B) in two separate ways. First, it issued a general regulation granting relief to nonimmigrants who could show that their unlawful status had been known to the government. 8 C.F.R. 245a.2(b)(3). Second, it issued a pair of regulations granting relief to any individual who had entered under a so-called "duration of status" visa, if the status described in the visa ended before January 1, 1982. 8 C.F.R. 245a.2 (b)(11) and (12). Because INS treated the latter situation as one in which lawful status expired "through the passage of time," the latter regulations did not require an individual to whom they applied to prove further that his unlawful status had been known to the government. *Ibid.*

The court of appeals' conclusory analysis of the validity of the relevant regulations entirely misapprehends the proper standard for evaluating the constitutionality of distinctions regarding aliens under the equal protection component of the Due Process Clause. First, the court did not suggest that the regulations are inconsistent with IRCA; indeed, the pertinent portion of the court's opinion does not quote the relevant statutory provisions, or refer to the distinction between individuals whose lawful status expired through the passage of time and those whose status became unlawful in other ways. Nor do we see any substantial basis for suggesting that the regulations violate IRCA.[6] Accordingly, the dispositive question is whether the *statutory* distinction between the two classes of aliens is one that the Constitution permits.

This Court's decisions make it clear that the distinction in questior would be permissible even if it involved ordinary matters of domestic regulation. As this Court explained twice during the final month of last Term, "a classification 'must be upheld against

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[6] We do not understand respondents to argue that INS should have included the groups of aliens discussed by the court of appeals within the group of aliens covered by the clause of IRCA granting relief to aliens who lost their status "through the passage of time." In any event, there would be no basis for such an argument. The status of students who left school before graduation (discussed at App., *infra*, 28a n.28) became unlawful because they violated their status by leaving school, not because of the passage of time. Similarly, temporary employees and intra-company transferees (discussed at App., *infra*, 29a n.29) never had duration of status visas in the first place, so their status could not have become unlawful through the passage of time; it could have become unlawful only through violation of the terms of their visas.

equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller* v. *Doe*, No. 92-351 (June 24, 1993), slip op. 7 (quoting *FCC* v. *Beach Communications, Inc.*, No. 92-603 (June 1, 1993), slip op. 6). Application of that standard could not plausibly lead to invalidation of the distinction challenged in this case.

Given the general purpose of the legalization provisions of IRCA to apply only to aliens who had resided in this country unlawfully for a substantial period of time, it was rational for Congress to provide separate and more detailed requirements for aliens who originally entered the country lawfully as nonimmigrants. Within that class, it furthered Congress's general policy to limit relief to individuals whose status was plainly unlawful by 1982. Automatic expiration of lawful status by the passage of time was one way for an alien's status to have become unlawful in a way that was sufficiently clear to justify relief without the need for further proof. Congress reasonably could have concluded that the very nature of duration of status visas would, in itself and as a general matter, furnish some measure of notice to INS that the aliens' status had (or might have) become unlawful. Congress also elected to extend relief to aliens whose status became unlawful in other ways that would not reasonably afford such notice to INS—but only if they could show that their unlawful status was otherwise known to the government.

The different ways in which eligibility may be established by aliens in these two categories—"through the passage of time," or through proof that their unlawful status was nevertheless known to the government

—reflect differences in the nature of the visas the respective aliens held and the ways in which their status became unlawful. The distinctions therefore clearly pass constitutional muster under this Court's recent decision in *Heller* v. *Doe*, which sustained differing standards of proof against a similar equal protection challenge. See *Heller*, slip op. 11 (upholding constitutionality of differing burdens of proof for commitment of mentally retarded and mentally ill individuals, because "[a] statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective") (internal quotation marks omitted). The constitutionality of the provisions challenged here is even more evident in light of the "special judicial deference" appropriate for policy choices in the immigration context, a deference that has its greatest weight in circumstances, such as those present here, in which Congress prescribes the limits of immigration-related relief. *E.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 793 (1977); see *Reno* v. *Flores*, 113 S. Ct. 1439, 1449 (1993).[7]

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[7] The court of appeals erred in suggesting (App., *infra*, 28a n.27) that it was irrational for INS to distinguish between foreign government employees who lost their jobs and students who quit school. As mentioned above, it is clear that INS acted reasonably in excluding students who quit school from the "passage of time" class; their status became unlawful through their choice to quit school, not through the passage of time. Similarly, it was reasonable for INS to include discharged foreign government employees in the "passage of time" class. Employment by a foreign government was the condition of status that established the duration of the employees' lawful stay; their lawful status terminated not (like the status of the students) through a violation of

In our view, the clarity of the error of the court of appeals is sufficient to justify summary reversal of the court's holding that the regulations in question —and therefore the statutory distinction on which they are based—violate the equal protection component of the Fifth Amendment's Due Process Clause. Nevertheless, because we believe this case should in any event be remanded to the court of appeals for further consideration in light of *CSS II*—and because this Court's decisions in June 1993 in *Beach Communications* and especially in *Heller* underscore the gravity with which a federal court should consider invalidating as irrational a congressional policy choice affecting burdens of proof—we suggest that it would be appropriate to afford the court of appeals an opportunity to reconsider the equal protection issue in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decisions in *Reno* v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993); *Heller* v. *Doe*, No. 92-351 (June 24, 1993); and *FCC* v. *Beach Communications*,

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the terms of their visas, but through a cessation of the employment that made their status lawful. Although the distinction is sufficiently close that INS might have been permitted by IRCA to exclude the foreign government employees from the "passage of time" category as well, its decision to extend relief to them under the "passage of time" rationale, despite the ambiguity of their status, could not plausibly be characterized as sufficiently arbitrary to violate IRCA, much less the Constitution.

Inc., No. 92-603 (June 1, 1993), as well as the decision of the Associate Commissioner of INS for Examinations in *Matter of H* (June 11, 1993).

Respectfully submitted.

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JULY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 89-35345, 89-35593, 89-35613 and 89-35706

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, COMMISSIONER, INS; EDWIN MEESE; U.S. ATTORNEY GENERAL; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHI-

CAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, COMMISSIONER, INS; EDWIN MEESE, U.S. ATTORNEY GENERAL; U.S. DEPARTMENT OF STATE, ETC., ET AL., DEFENDANTS-APPELLANTS

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS

and

COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO), ET AL., PLAINTIFFS-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, COMMISSIONER, INS; EDWIN MEESE; U.S. ATTORNEY GENERAL; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO, PLAINTIFFS-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, COMMISSIONER, INS; EDWIN MEESE; U.S. ATTORNEY GENERAL; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington

Decided Sept. 18, 1992

Before: FARRIS, PREGERSON, and FERGUSON, Circuit Judges.

PREGERSON, Circuit Judge:

OVERVIEW

Congress passed The Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. 99-603, to create a comprehensive program to regulate immigration to the United States. One of IRCA's main purposes is to grant legalization to certain groups of illegal aliens with longstanding residence in the United States.

To achieve that purpose, IRCA provides that persons who have lived continuously and unlawfully in the United States since January 1, 1982 may become lawful permanent residents if they satisfy certain conditions. The Immigration and Naturalization Service ("INS") has statutory authority to promulgate regulations establishing criteria and procedures for the legalization process.

In 1988, several individuals and organizations filed suit in federal district court challenging INS policy and regulations on numerous statutory and constitutional grounds. The plaintiffs to that action included five individual nonimmigrants [1] and seven organizations that assist nonimmigrants throughout the legalization process.[2] Their challenge to INS policy and regulations focused on the agency's interpretation of the statutory requirement that a nonimmigrant must have lived *continuously and unlawfully* in the United States since January 1, 1982 to qualify for legalization under IRCA.

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[1] Nonimmigrants referred to in this opinion are aliens in the United States on visas for a specific purpose and for a limited time.

[2] The original plaintiffs included several other organizations and individuals who are not parties to this appeal.

The district court granted both declaratory and injunctive relief, but on a narrower basis than requested by plaintiffs. The district court also granted the government's motion for a stay of all relief pending appeal to this court.

We deferred our own decision in the case because important jurisdictional issues were then pending before the United States Supreme Court and two panels of our circuit.[3] Those cases have now been decided, supplemental briefs were filed by the parties, and this case was resubmitted for decision on September 1, 1992. We have reviewed the parties' numerous contentions and the district court's published and unpublished decisions. We affirm in part, reverse in part, and remand to the district court for further proceedings.

DISCUSSION

I. Jurisdiction, Exhaustion of Remedies, and Standing

A. *Subject Matter Jurisdiction*

The INS contends that the district court lacked subject matter jurisdiction to review the plaintiffs' challenges to INS policy and regulations. The contention is without merit.

This issue has been resolved by the Supreme Court's decision in *McNary v. Hatian Refugee Center, Inc.*, 498 U.S. 499, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991), and by our recent decisions in *Zambrano v.*

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[3] *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 499, 111 S.Ct. 888, 112 L.Ed.2d 100 (1991); *Zambrano v. INS*, 972 F.2d 1122 (9th Cir.1992); *Catholic Social Services v. Thornburgh*, 956 F.2d 914 (9th Cir.), *cert. granted*, —— U.S. ——, 112 S.Ct. 2990, 120 L.Ed.2d 86 (1992).

INS, 972 F.2d 1122 (9th Cir.1992), and in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir.1992). Both the Supreme Court in *McNary* and our court in *Zambrano* and in *Catholic Social Services* concluded that the district court had jurisdiction to review INS regulation promulgated under IRCA. *See McNary*, 498 U.S. at ——, 111 S.Ct. at 897 (district court had jurisdiction to review INS procedures for evaluating applicants for amnesty under IRCA's Special Agriculture Worker program); *Zambrano*, 972 F.2d at 1124 (district court had jurisdiction to review INS regulation interpreting IRCA standard for admissible aliens); *Catholic Social Services*, 956 F.2d at 919-21 (district court had jurisdiction to review INS regulations interpreting IRCA requirement for continuous physical presence in the United States). In all of these cases, the statutory provisions for judicial review in IRCA were found to allow federal district courts to hear broad-based constitutional and statutory challenges to INS regulations.[4]

In the present case, the statutory provision for judicial review is identical to that construed in *Zambrano* and *Catholic Social Services*. Our own case law therefore dictates the conclusion that the district court had subject matter jurisdiction to hear plaintiffs' challenges to INS regulations.[5]

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[4] In *McNary*, the Supreme Court construed 8 U.S.C. § 1160(e) (1988), and concluded that it did not preclude federal question jurisdiction in the district court. *Zambrano* and *Catholic Social Services* construed the same judicial review provision at issue in the present case. *See* 8 U.S.C. § 1255a(f) (1988); *Zambrano*, 972 F.2d at 1124; *Catholic Social Services*, 956 F.2d at 919.

[5] The INS argues that the district court did not have jurisdiction to issue an order in June 1989 once the government

B. *Exhaustion of Remedies*

The INS argues on appeal that the district court should not have granted relief because the remedies available to legalization applicants under IRCA have not been exhausted. The district court rejected the agency's arguments about exhaustion on the ground that the organizational plaintiffs have no remedies to exhaust under IRCA. On appeal, the INS contends that *individual applicants* should have to exhaust their statutory remedies and that the district court's analysis of the exhaustion issue does not address this contention.

We review the district court's decision de novo, *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir.1992), and conclude that requiring individual applicants to exhaust their statutory remedies would serve no useful purpose here.

The purpose of exhaustion is to allow administrative agencies to complete their own decisionmaking procedures and to discourage premature judicial intervention. The INS argues that judicial review is premature because the agency has not completed its process of adjudicating individual applications for legalization.

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filed its notice of appeal from the district court's March 1989 order. This argument fails. The district court specifically noted that the March 1989 order was not a final judgment. *See Immigration Assistance Project of Los Angeles County Fed'n of Labor v. INS* (*"Immigration Assistance II"*), 717 F.Supp. 1444, 1446 n. 2 (W.D.Wash.1989). In a proceeding involving multiple claims and parties, district courts have authority to revise an order or other form of decision at any time before the entry of judgment adjudicating all claims, rights and liabilities of the parties. *See* Fed.R.Civ.P. 54(b); *see also* Fed.R.Civ.P. 62(c).

The agency's argument is beside the point. The organizational plaintiffs have presented broad-based statutory and constitutional challenges to INS regulations. The organizational plaintiffs are not requesting that the court review individual applications. As to the issues presented by the organizational plaintiffs in this case, the INS has already completed its decisionmaking process.

Requiring individual applicants to exhaust administrative remedies before the organizational plaintiffs may bring broad-based statutory and constitutional challenges makes little sense. The statutory remedies available to individual applicants provide no real opportunity to present the complex constitutional and statutory issues involved here. It is unreasonable to expect individual applicants who are often not represented by counsel to press such arguments. Moreover, individuals who do raise broader challenges to agency regulations do not have remedies in the administrative appeals process that are equivalent to those available in federal court. INS adjudicators are not empowered to invalidate agency regulations.[6] Agency adjudicators reviewing statutory or constitutional challenges that might arise in an individual case must review those challenges on the basis of a limited administrative record.[7] The only

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[6] *See Dastmalchi v. INS*, 660 F.2d 880, 886 (3dCir.1981); *Matter of Fede*, Interim Dec. 3106 (BIA May 11, 1989) at 2 (regulation promulgated by the Attorney General has the force and effect of law as to immigration judges; those judges do not have authority to consider challenges to regulations); *Haitian Refugee Center, Inc. v. Civiletti*, 503 F.Supp. 442, 469 (S.D.Fla.1980) (same).

[7] *Cf. McNary*, 498 U.S. at ——, 111 S.Ct. at 898-99 (noting that constitutional and statutory challenges require develop-

other opportunity for an alien to challenge INS regulations is to surrender for deportation and then appeal the deportation order in federal court. *See* 8 U.S.C. §§ 1105a, 1255a(f)(4) (1988). Furthermore, IRCA provides no remedies either to the organizations who are plaintiffs to this action or to those aliens discouraged from applying for legalization because of putatively invalid regulations. Finally, where the INS' interpretation of the statute is clear, we need not wait for the agency to adjudicate individual applications to be able to review broad-based challenges to INS policy and regulations such as those presented here by the organizational plaintiffs.

We agree with the district court that judicial review of plaintiffs' challenges to INS policy and regulations is not premature. We also agreed with the district court that waiting for the agency to adjudicate individual cases before reviewing INS regulations could cause considerable hardship to applicants.

C. *Organizational Standing*

The INS maintains on appeal that the seven organizational plaintiffs do not meet the requirements for organizational standing. The agency contends that INS regulations caused no injury to the plaintiff organizations and that IRCA was not intended to protect these organizations in any event.

The district court rejected these arguments and denied the government's motion to dismiss. We re-

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ment of substantial amount of evidence that is not usually available in the administrative record developed for an individual application).

view the district court's decision de novo and agree that the requirements for organizational standing were met in this case. *See United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Ins. Corp. of America* 919 F.2d 1398, 1399 (9th Cir.1990) (standing is a question of law reviewed de novo).

To establish standing, the organizational plaintiffs must plausibly allege that an agency's illegal action is the cause of some threatened or actual injury to the organization and that this injury can be remedied by the court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The organizational plaintiffs must also show that their injury is within the zone of interests protected or regulated by the statute. *Valley Forge*, 454 U.S. at 475, 102 S.Ct. at 760; *McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983).

The record demonstrates that INS regulations for eligibility criteria caused harm to the organizations by draining organizational resources and impairing their ability to assist and counsel nonimmigrants. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982) (standing found for organizations on the basis of concrete and demonstrable injury caused by regulations that drained organizational resources); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-39 (D.C.Cir.1986) (same).

The plaintiff organizations fall squarely within the zone of interests protected by IRCA. The organizational plaintiffs provide services to an identifiable

group of individuals that Congress specifically intended organizations such as these to represent.[8] Moreover, the zone of interests requirement for standing is not particularly stringent, and is meant only to preclude standing for those whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Association*, 479 U.S. 388, 399, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987).

II. Statutory and Procedural Background

IRCA requires nonimmigrant aliens to show that they lived *continuously and unlawfully* in the United States as of January 1, 1982 to qualify for legalization. 8 U.S.C. § 1255a(a)(2) (1988).[9] Under the statute, an alien can meet this requirement by showing that his or her unlawful status was "known to the government" as of January 1, 1982. 8 U.S.C. § 1255a(a)(2)(B) (1988).

The INS promulgated regulations interpreting the statutory requirements of "continuous unlawful resi-

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[8] Congress provided special status for community organizations so that they could assist the Attorney General "to encourage participation among undocumented aliens who fear coming forward . . . ." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5677; *see also* 8 U.S.C. § 1255a(c)(1)-(4) (1988).

[9] To qualify for legal residency, aliens must also: (1) file a timely application; (2) maintain continuous physical presence in the United States from the effective date of IRCA, November 6, 1986, and (3) be otherwise admissible as an immigrant. 8 U.S.C. § 1255a(a)(1)-(4) (1988).

dence" and "known to the government." *See* 8 C.F.R. §§ 245a.1(d), 245a.2(b) (1992). Plaintiffs challenged those regulations in federal district court on both statutory and constitutional grounds.

The district court granted plaintiffs' request for declaratory relief. The court also issued injunctive relief, though not to the full extent requested by plaintiffs.

On appeal, the agency maintains that its policies and regulations are valid and that the district court exceeded its authority to grant relief in any event. The plaintiffs assert on cross-appeal that the district court erred by denying some of the injunctive relief requested.

We discuss these contentions below as they affect three different categories of nonimmigrants. The category designations group together nonimmigrants who, as a consequence of some putatively invalid INS regulation, were or may be wrongfully denied legalization under IRCA. *The category designations used here are for convenience only.* They are not statutory or regulatory.

We review the propriety of the district court's grant of declaratory relief de novo. *Fireman's Fund Ins. Co. v. Ignacio,* 860 F.2d 353, 354 (9th Cir. 1988). The grant or denial of injunctive relief rests within the sound discretion of the trial court. We will not reverse or modify an injunction in the absence of a clear abuse of discretion by the district court. *E. & G. Gallo Winery v. Gallo Cattle Co.,* 955 F.2d 1327, 1344 (9th Cir.1992) (citing *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1021 (9th Cir.1985), *cert. denied,* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986)).

III. Category One: Section 265 Nonimmigrants

This first category includes nonimmigrants who failed to comply with the registration requirements of section 265 of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1305 (1976) (amended 1982). Under section 265, nonimmigrants were required to register with INS by January 30 of each year and to notify INS of their address at the end of each three-month period.

Plaintiffs argued before the district court that noncompliance with section 265 should satisfy some of the statutory requirements for legalization under IRCA. In particular, plaintiffs urged that failure to comply with section 265 was sufficient to show that these nonimmigrants were unlawful residents of the U.S. and that their unlawful status was "known to the government" within the meaning of IRCA. Accordingly, plaintiffs argued that INS policy [10] was invalid because it did not permit this group of nonimmigrants to satisfy IRCA legalization requirements

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[10] Throughout this section of the opinion, we refer to INS policy rather than INS regulations because the agency maintains that its published regulations are no longer a complete reflection of agency policy. Rather, the INS says that its policy regarding section 265 nonimmigrants is also governed by the standard that the district court imposed in *Ayuda, Inc. v. Meese*, 687 F.Supp. 650 (D.D.C.1988), *vacated in part by Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C.Cir.1989), *vacated*, —— U.S. ——, 111 S.Ct. 1068, 112 L.Ed.2d 1174 (1991). In its supplemental brief filed June 18, 1992, the INS stood by its assertion that it is still following the "new standard" it agreed to in *Ayuda v. Meese* even though that decision was since overturned by the D.C. Circuit on jurisdictional grounds.

We set out the INS's "new standard" in full in note 12 below.

by showing that they failed to comply with the registration and notice requirements of section 265.

The INS responded to plaintiffs' contentions before the district court by arguing that it had no settled policy regarding section 265 nonimmigrants. Specifically, the INS contended that its interpretation of the statutory requirement of "known to the government" was still too unsettled to form a basis for judicial review. Accordingly, the INS argued that the plaintiffs' contentions regarding section 265 nonimmigrants were not ripe for judicial review. As an alternative position, the INS argued before the district court that its interpretation of IRCA was valid in relation to section 265 nonimmigrants.

The district court rejected the agency's contentions. The court found that the agency had a set policy regarding section 265 nonimmigrants. The district court further concluded that INS policy regarding section 265 nonimmigrants was inconsistent with congressional intent and granted both declaratory and injunctive relief in favor of plaintiffs.

Before our court, the INS continues to assert the positions it argued in district court.

A. *Ripeness*

The INS argues on appeal that it has no settled policy dictating how the "known to the government" requirement for legalization under IRCA will be applied to section 265 nonimmigrants.

The district court concluded that agency policy regarding how the "known to the government" requirement would apply to section 265 nonimmigrants was "sufficiently concrete" to warrant adjudication. *Immigration Assistance Project of the Los Angeles County Federation of Labor v. INS ("Immigration*

Assistance I"), 709 F.Supp. 998, 1004 (W.D.Wash. 1989), *amended by Immigration Assistance II*, 717 F.Supp. 1444 (W.D.Wash.1989). We review the district court's decision de novo, *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir.1990), *cert. denied*, —— U.S. ——, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991). To determine ripeness, we evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967).

We agree with the district court that the issues presented by the organizational plaintiffs regarding section 265 nonimmigrants are ripe for judicial review. Pursuant to its clear statutory duty, the INS has developed regulations and policies that apply to section 265 nonimmigrants.[11] Those regulations and policies are not so unsettled as to preclude judicial review at this stage. Moreover, our conclusion that the agency has a settled policy regarding section 265 nonimmigrants remains unchanged whether we examine the published regulations or a so-called "new standard" that the agency says it is following.[12]

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[11] IRCA provides that the Attorney General "shall broadly disseminate information respecting the benefits which aliens may receive under [IRCA] and the requirements to obtain such benefits" before the application period starts. 8 U.S.C. § 1255a(i) (1988).

[12] In *Ayuda v. Meese*, the district court entered an order instructing the INS to follow a specific standard for interpreting the statutory requirement of "known to the government." That standard provided that:

> [A] nonimmigrant alien must establish that prior to January 1, 1982, documentation existed in one or more

The INS's argument that its policy regarding section 265 nonimmigrants is not sufficiently settled to permit judicial review fails for several reasons.

First, the published regulations are clear on their face that section 265 nonimmigrants will be denied legalization. As written, the regulations simply will not allow applicants to use their previous noncompliance with section 265 as a means of proving that their unlawful status was "known to the government." 8 C.F.R. § 245a.1(d) (1992).[18] This regula-

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> government agencies so that . . . such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Said documentation must be in the files of the government prior to January 1982, or such other time as may be permitted by INS regulations. The burden is on the nonimmigrant alien to meet this standard.

Ayuda v. Meese, 687 F.Supp. at 666-67.

[18] INS regulations provide that an alien may prove that his or her unlawful status was known to the government *only if:*

> (1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government . . .
>
> (2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982 . . .
>
> (3) A copy of a response by the Service to any other agency which advised that agency that a particular alien,

tion remained in effect for at least eleven of the twelve months that nonimmigrants had to apply for legalization. Thus, the INS had a concrete policy in 8 C.F.R. § 245a.1(d) that excluded section 265 applicants during most of the amnesty application period. Those section 265 nonimmigrants who relied on the INS regulation and did not apply for legalization can certainly show that their claims are ripe for judicial review.

Second, it is clear that the "new standard," as interpreted by the INS, will preclude legalization for section 265 nonimmigrants. According to the INS's own information wire, the agency interprets its "new standard" to preclude section 265 applicants from eligibility.[14]

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had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school . . . which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982.

8 C.F.R. § 245a.1(d)(1)-(4).

[14] The Association Commissioner of the INS sent the organizations that assist nonimmigrants in the legalization process an information wire on April 13, 1988, notifying them of the new *Ayuda v. Meese* standard. This wire stated: "[T]he violation must be able to be induced [sic] from *evidence submitted* to Federal agencies only, and prior to January 1, 1982." *Ayuda I*, 880 F.2d at 1362 n. 14 (Wald, C.J., dissenting) (emphasis added). This correspondence shows that the INS would not consider the absence of a 265 report in the files as constituting sufficient knowledge by the agency of the nonimmigrant's unlawful status.

Third, the district court found that INS legalization officers had informed both the organizations that process applications and individual nonimmigrants that section 265 applicants would be denied. *Immigration Assistance I*, 709 F.Supp. at 1001. Indeed, this evidence was sufficiently persuasive for the district court to conclude that summary judgment for the plaintiffs was appropriate because of the high probability that section 265 nonimmigrants would be denied legalization. *Immigration Assistance I*, 709 F.Supp. at 1001.

Fourth, the district court pointed out that the INS's claim that it has no settled policy is belied by its own arguments that section 265 violators do not qualify for legalization under the "known to the government" standard. Furthermore, the agency's steadfast refusal over the past four years to adjudicate cases involving 265 applicants is hardly convincing evidence that the INS's true position on section 265 applicants remains unsettled. While evidence that the agency actually denied some section 265 applicants would strengthen a conclusion that the INS has a settled policy, such proof is not a prerequisite for ripeness. This is particularly true in the present case where the agency has purposefully refused to adjudicate individual applications.

We are not persuaded that ripeness is destroyed in this case by the possibility asserted by the INS that it may promulgate additional regulations in the future. The agency was required by statute to promulgate regulations defining eligibility criteria for legalization under IRCA before the application period would begin. If we allow the possibility that an agency may promulgate additional regulations in the future to dictate our decisions on ripeness, then an

administrative agency's regulations could foreover escape judicial review. The doctrine of ripeness is not intended to promote an absurd result.[15]

As a final consideration, we note that the district court was especially concerned with hardship to applicants who are served by the organizational plaintiffs. We also recognize that the organizations who assist nonimmigrants through the legalization process would share that hardship. Moreover, from the standpoint of those organizations, the issues presented are ripe for judicial review.

The organizations allege that agency policy interpreting the statutory requirement of "known to the government" makes it difficult for them to advise legalization applicants and to disseminate accurate information. While section 265 nonimmigrants wait for the INS to adjudicate their applications, the organizations must monitor all cases for possible wrongful denials, further draining their limited resources. Finally, as the district court noted, denying judicial

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[15] We decline to adopt the approach taken by the majority in *Ayuda I*, 880 F.2d 1325 (D.C.Cir.1989). In *Ayuda I*, a panel of the D.C. Circuit issued a split opinion which concluded that the district court lacked jurisdiction to hear the case. The majority went on to conclude, as an alternative holding, that the issues presented regarding section 265 nonimmigrants were not ripe for review. *Ayuda I*, 880 F.2d at 1341-46.

The discussion of ripeness in *Ayuda I* and in *Ayuda II* is dicta. *See Ayuda I*, 880 F.2d at 1341; *Ayuda II*, 948 F.2d 742, 747. Our own analysis of ripeness in this case leads us to a contrary conclusion. Finally, two of our own decisions have resolved the initial question of jurisdiction differently from the majority's opinion in *Ayuda I* and *Ayuda II*. *See Catholic Social Services*, 956 F.2d 914; *Zambrano*, 972 F.2d 1122.

review at this stage would as a practical matter foreclose any opportunity for the plaintiff organizations to pursue broad-based statutory and constitutional challenges to INS policy. District Court Order, November 3, 1988 at 12.

B. *Declaratory Relief*

The INS argues in the alternative before this court as it did before the district court that its existing policy regarding section 265 nonimmigrants is valid. The agency maintains that a nonimmigrant's failure to file an address report as required by section 265 does not satisfy the statutory requirement for legalization that a nonimmigrant must have lived continuously and unlawfully in the United States as of January 1, 1982. Specifically, the INS contends that a nonimmigrant's failure to file address reports is not sufficient to meet *either* of two statutory criteria for proving continuous unlawful residence: (1) proof of unlawful status, *or* (2) proof that the nonimmigrant's unlawful status was "known to the government."

The district court ruled to the contrary on both of the INS's contentions about the validity of its policy towards section 265 nonimmigrants. We agree with the district court.

First, the district court correctly noted that a nonimmigrant who violated 8 U.S.C. § 1305 (section 265 of the Immigration and Naturalization Act) faced criminal penalties and deportation. *Immigration Assistance I*, 709 F.Supp. at 1001; *see* 8 U.S.C. § 1306(b) (1988) (defining penalties for violating section 265)); *Fong v. INS*, 308 F.2d 191, 193 (9th Cir.1962) (alien deportable for failing to file pursu-

ant to section 265). Because of the drastic consequences that aliens would suffer by violating section 265, the government's argument that noncompliance with that section may not prove unlawful status is unavailing.[16]

Second, the district court concluded that section 265 violations were "known to the government" precisely because the INS had no periodic address report on file for the alien as required by statute and regulation. We agree with the district court's conclusion.

The record shows that before January 1, 1982, the INS reviewed agency records to determine whether nonimmigrants had complied with the reporting requirements under section 265. The absence of the required section 265 report identified those in violation.

As a consequence of its own practices, the INS had *actual knowledge* of an alien's unlawful status. The government's argument about imputing knowledge of unlawful status from evidence of a section 265 violation is unpersuasive.

Finally, our reading of IRCA's legislative history supports the district court's conclusion that INS policy regarding section 265 violators is not consistent

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[16] The INS makes the additional argument that a section 265 violation must be "willful," and not merely inadvertent, for it to be unlawful. The INS reasons that it could not have known, simply by looking at an alien's file, whether the alien's failure to file a section 265 report was "willful" and thus unlawful.

We disagree. Willfulness is not an element of a section 265 violation; instead, an alien threatened with deportation may merely invoke the absence of willfulness as an affirmative defense. The alien would have the burden of establishing this defense.

with congressional intent. The legislative history demonstrates that the House Judiciary Committee was concerned that "[u]nnecessarily rigid demands for proof of eligibility could seriously impede the success of the legalization effort." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5677. Furthermore, Congress expected "the INS to incorporate flexibility . . . permitting the use of affidavits of credible witnesses and taking into consideration the special circumstances relating to persons previously living clandestinely in this country." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), 1986 U.S.C.C.A.N. 5677. Finally, the legislative history of IRCA shows that Congress believed that "the legalization program should be implemented in a liberal and generous fashion. . . ." H.R.Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 72 (1986), 1986 U.S.C.C.A.N. 5676.[17] The district court properly concluded that INS policy represents an overly restrictive interpretation of IRCA because it would preclude section 265 nonimmigrants from proving that their unlawful status was "known to the government."

C. *Injunctive Relief*

The INS argues that the district court erred when it issued injunctive relief that required the agency

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[17] Indeed, the Judiciary Committee specifically drafted IRCA to incorporate those undocumented residents who have lived in the United States for a number of years and have established valuable ties with communities all around the country. One of the major purposes of IRCA was to eliminate an illegal subclass of people residing in this country. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986), 1986 U.S.C.C.A.N. 5653.

to use a particular procedure [18] under which nonimmigrants could prove that their unlawful status was "known to the government." We disagree with the agency's contention and conclude that the district court in establishing such procedure properly exercised its discretion to structure equitable relief.

The district court established a procedure whereby nonimmigrants who violated section 265 by failing to file an address report every three months could prove that their unlawful status was "known to the government." The district court fashioned relief in this form because section 265 violators face a difficult task to prove that their unlawful status was known to the government. Merely proving that they failed to comply with section 265 would be difficult enough because government notices of violation are generally destroyed after two years.

The INS contends that only the agency may create specific proof requirements to effectuate IRCA's legalization program. We disagree.

The procedure developed by the district court is consistent with the purpose of the legalization provi-

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[18] The district court's order provided that the applicant would have the burden of making a prima facie showing that he or she violated the address reporting requirements. Once the applicant made this showing, the INS then would be required to introduce proof that the alleged section 265 violation and subsequent unlawful status was not known to the government. If the INS met this burden of production, the applicant would then have to show by a preponderance of evidence that he or she was in unlawful status and that this unlawful status was known to the government. The district court emphasized that an alien carries the burden of persuasion to prove eligibility for legalization at all times. *Immigration Assistance II*, 717 F.Supp. at 1448.

sions in IRCA and with Congress's intent in drafting them.[19] The district court properly exercised its broad discretionary power to fashion equitable relief that would offer a fair and workable mechanism for section 265 nonimmigrants to prove that their unlawful status was "known to the government." *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. 864, 881 (S.D.Fla.1988), *aff'd* 872 F.2d 1555 (11th Cir.1989), *aff'd McNary*, 498 U.S. 499, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) (INS ordered to reconsider Special Agricultural Worker legalization denials with the proper standard of proof "which will require the government to present evidence to negate the just and reasonable inference[s]. . . ."); *see also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir.1990) (trial court is vested with broad discretionary power to structure equitable relief); *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 44, 360 n. 45, 361 n. 47, 97 S.Ct. 1843, 1866 n. 44, 1867 n. 45, 1868 n. 47, 52 L.Ed.2d 396 (1977) (judicially crafted shift of presumption furthers substantive command of Title VII).

On cross-appeal, plaintiffs argue that the district court abused its discretion when it declined to order the INS to adjudicate applications from section 265 nonimmigrants within 90 days of the district court's decision. The district court decided not to set the deadline requested by plaintiffs because it was reluctant to interfere with INS procedures for adjudicating individual cases.

Although plaintiffs raise valid concerns about harm to section 265 nonimmigrants which may result from any delay in INS adjudications, we find no abuse of

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[19] *See* note 17 and accompanying text.

discretion in the district court's decision. The district court did order the INS to notify these applicants if their case would not be resolved within 90 days of the date on which the district court enters its judgment.[20] We agree with the district court that this is an adequate remedy at this time.

IV. Category Two Nonimmigrants

This second category of nonimmigrants consists of students and employees who violated the terms of their visas before 1982.[21] Under INS policy and regulations,[22] these nonimmigrants would qualify for

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[20] The INS argues that the district court abused its discretion by ordering the agency to notify section 265 nonimmigrants if their applications would not be decided within 90 days after the district court's judgment. We find no abuse of discretion in the district court's decision. The notification requirement is not particularly burdensome to the agency and it mitigates the hardship of any delay in the agency's decision-making procedures. Moreover, the notification requirement gives section 265 applicants an opportunity to monitor agency compliance with the district court's order.

[21] Category two nonimmigrants consists of the following nonimmigrant aliens: (1) temporary employees admitted on "H" visas; (2) intra-company transferees admitted on "L" visas; and (3) students admitted on duration of status "F" visas who did not graduate before January 1, 1982.

[22] For this category of nonimmigrants, both the published regulations and the "new standard" apply. *See* note 12.

The INS has revised its regulations since they were first promulgated in 1987. Some of those revisions affect category two nonimmigrants. *See* 8 C.F.R. § 245a(1)(d)(4) (as amended in 1988). These revisions were in effect at the time the district court issued its decisions, and were incorporated into the district court's analysis of the plaintiffs' contentions

amnesty only if they prove that the government knew of their unlawful status. 8 C.F.R. § 245a.2(b)(3) (1992). INS regulations did not apply this requirement to another group of students and employees.[23] Instead, INS regulations allowed this other group to satisfy IRCA's requirement of unlawful status merely by showing that their authorized stay in the United States had expired "through the passage of time" before 1982. 8 C.F.R. § 245a.2(b)(11)-(12) (1992); *see* 8 U.S.C. § 1255a(a)(2)(B).

Plaintiffs argued before the district court that INS regulations violated equal protection because the regulations treated similarly situated groups differently without any rational basis for doing so. The district court agreed and ordered the INS to apply a specific procedure to category two nonimmigrants under which they could prove unlawful status.[24]

The INS maintains on appeal that its regulations and policies constitute a reasonable interpretation of

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regarding category two nonimmigrants. Similarly, our analysis of category two incorporates both the effect of the "new standard" and of the INS's revised regulations.

[23] The other group consists of three types of nonimmigrants: (1) foreign government employees admitted on duration of status "A" visas; (2) representatives of international organizations admitted on duration of status "G" visas; and (3) students admitted on duration of status "F" visas who remained in the United States after they graduated.

[24] The district court's order granting injunctive relief would allow category two nonimmigrants to satisfy IRCA's unlawful status requirement for legalization either by showing that the government knew of the individual's unlawful status or by showing that their legal status expired "through the passage of time" within the meaning of 8 U.S.C. § 1255a(a)(2)(B) (1988).

the statute and do not violate equal protection. Further, the agency argues that the procedure ordered by the district court is an abuse of discretion.[25]

The plaintiffs argue on cross-appeal that the district court erred because it granted this injunctive relief only to *prospective* category two nonimmigrants. Plaintiffs contend that relief should have been extended retroactively because some category two nonimmigrants were wrongfully denied legalization on the basis of the INS regulations found unconstitutional by the district court.

A. *Declaratory Relief*

The INS contends on appeal that the district court erred because it did not defer to the agency's reasonable and constitutionally permissible interpretation of the statute. We disagree.

Under the equal protection clause of the Fifth Amendment, "[f]ederal classifications distinguishing among groups of aliens . . . are valid unless [they are] 'wholly irrational.'" *Sudomir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir.1985); *Mathews v. Diaz*, 426 U.S. 67, 82-83, 96 S.Ct. 1883, 1892-1893, 48 L.Ed.2d 478 (1976). The agency maintains that its regula-

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[25] In addition, the INS reasserts that the issues presented by organizational plaintiffs regarding category two nonimmigrants are not ripe for review. We disagree. INS policy regarding category two nonimmigrants is clear on the issues presented by the organizational plaintiffs here. The concreteness of INS policy is not undermined either by the INS's previous revisions to its regulations nor by the possibility that the agency may promulgate additional revisions in the future. As to the statutory and constitutional challenges presented by the organizational plaintiffs, INS policy is both concrete and settled.

tions are constitutionally permissible because the two groups of immigrants who are subject to different proof requirements for showing unlawful status are not similarly situated.[26]

The district court found no rational basis between the two groups to justify requiring category two nonimmigrants to meet different proof requirements for sohwing unlawful status as compared to other nonimmigrant students and employees who were similarly situated.[27] Our own analysis of the regulations leads to the same conclusion.[28] The arguments ad-

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[26] The INS's reliance on *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), is misplaced. Even federal regulatory classifications must have a rational basis to survive scrutiny under the equal protection clause of the Fifth Amendment. *See Mathews*, 426 U.S. at 83, 96 S.Ct. at 1893.

[27] For example, the district court concluded that no rational difference existed between a student who violates status by dropping out of school and an embassy employee who violates status by quitting work.

[28] For example, the two groups of students are similarly situated with respect to the very characteristic for which INS regulations distinguished them. The example is significant because students comprise the bulk of category two nonimmigrants.

INS regulations required one group of students to prove that their unlawful status was "known to the government" while the other had no such proof requirement. The group required to show proof were those students who violated their status *before graduation*. The group not required to show proof that their unlawful status was "known to the government" were those students who violated their status when they failed to leave the country and return home *after graduation*.

Federal immigration regulations required schools to notify the INS if any of these individuals violated immigration laws. *See* 8 C.F.R. § 214.3(g) (1981) (requiring schools to

vanced by the INS to the contrary are unpersuasive.[29]

B. *Injunctive Relief*

The district court remedied the equal protection violation by ordering the INS to follow a specific procedure under which category two applicants could prove unlawful status.[30] The INS contends that the

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report immediately to the INS those students who terminated their attendance or took too few units). Consequently, both groups of aliens are similarly situated with respect to IRCA's requirement for amnesty that their unlawful status be "known to the government." A different proof requirement for these two groups of students simply makes no sense and is unfairly burdensome.

[29] For example, category two H visa and L visa employees (temporary employees and intra-company transferees, respectively) are identically situated to non-category two A and G visa employees (foreign government employees and representatives of international organizations, respectively) because both groups violate status if they remain in the United States after their term of employment. Yet only the H and L visa holders are required to prove that their unlawful status was "known to the government" before January 1, 1982. 52 Fed.Reg. 43,843 (1987) (codified at 8 C.F.R. § 245a.2(b)(11)-(12)).

[30] The district court's order would allow category two applicants to prove unlawful status if they first make a prima facie showing that they violated the terms of their visas. The INS would then have the burden to come forward with evidence either that unlawful status did not occur through "the passage of time" or that the individual's unlawful status was not "known to the government." *See* 8 C.F.R. § 245a.2(b)(2)-(3) (1992). If the INS comes forward with this evidence, then the applicants must show by a preponderance of the evidence that they are eligible for legalization under

relief granted by the district court constitutes an abuse of discretion. We disagree.

Federal courts possess broad equitable powers to remedy constitutional violations. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 (5th Cir.1982). We find in the present case that the district court acted within the scope of its authority to remedy a constitutional violation and that it properly did so in a manner which gives meaningful effect to the statute. *See Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 881 (ordering INS to adopt proof procedure for implementing Special Agricultural Workers program under IRCA); *International Brotherhood of Teamsters*, 431 U.S. at 359 n. 45, 97 S.Ct. at 1867 n. 45. The procedure developed by the district court is consistent with Congress's intent that the IRCA legalization program be applied in a "liberal and generous fashion." H.R.Rep. No. 682, 99th Cong., 2d Sess. 72 (1986), 1986 U.S.C.C.A.N. 5676.[21]

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either the "passage of time" or "known to the government" standard. The district court emphasized that legalization applicants always have the burden of proving eligibility for legalization. *See Immigration Assistance II*, 717 F.Supp. at 1449; 8 C.F.R. § 245a.2(d)(5) (1992).

[21] Moreover, the procedure developed by the district court properly reflects practical difficulties in remedying the constitutional violation and implementing the purpose of the statute. The standard developed by the district court reflected the difficulty faced by category two applicants to prove

Finally, plaintiffs argue that the district court erred in affording only prospective relief to applicants in category two. In support of this argument, plaintiffs offer evidence that the INS wrongly denied legalization to some applicants based on the proof requirement which the district court found to violate equal protection.

We therefore remand to the district court so that any category two applicants who may have been denied legalization as a consequence of invalid INS regulations may be identified, and granted appropriate relief.

V. Category Three Applicants

This group includes nonimmigrants who were erroneously reinstated [32] to lawful status by the INS sometime after January 1, 1982. Initially, the INS took the position that such reinstatements *after* January 1, 1982 precluded a nonimmigrant from showing the requisite *continuity* of unlawful residence. In 1988, the agency's position changed when an INS

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that their unlawful status was known to the government. Except in special circumstances, the INS routinely destroyed notices of violations after two years. An applicant's chances to prove that the government knew of their unlawful status is often further confounded because an employer or school that would have notified the INS of the violation may no longer exist or may not have the proper records. The procedure ordered by the district court both remedies the constitutional violation and recognizes the practical difficulties faced by these nonimmigrants. *See Orantes-Hernandez*, 919 F.2d at 558.

[32] The reinstatements were erroneous because they resulted either from the individual's fraud or misrepresentation or from mistake.

adjudicator decided *Matter of N*, 19 I. & N. Dec. 760 (1988). In *Matter of N*, 19 I. & N. Dec. at 762, a Legalization Appeals Unit ("LAU")[33] held that a category three applicant who was reinstated to lawful status after misrepresenting material facts is still eligible for legalization if he or she meets the other statutory requirements under IRCA.

Until *Matter of N* was decided, the INS took the position that such reinstatements, though made erroneously, were enough to defeat the "continuous and unlawful residence" legalization requirement stated in 8 U.S.C. § 1255a(a)(2)(A) (1988). Before *Matter of N* was decided, the INS had maintained that category three applicants were ineligible for legalization under IRCA because the reinstatements precluded a showing their their residence in the United States was both continuous and unlawful.

The INS argued in district court that its change of position in *Matter of N* had the effect of mooting plaintiffs' request for injunctive relief. Plaintiffs contended before the district court that the INS has not applied its decision in *Matter of N* uniformly, leaving some category three applicants without relief. Furthermore, plaintiffs argued that some category three applicants who, before *Matter of N* was decided, may have been wrongfully denied legalization, are unaware that they may now be eligible for legalization under IRCA.

The district court agreed with plaintiffs. The court ordered the INS to review cases involving category three applicants who might have been wrongly denied legalization. On appeal, the INS maintains that the

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[33] The LAU is the final level of administrative appeals for legislation applicants.

district court's injunction was unnecessary and overbroad.[34]

District courts have broad remedial powers to redress injuries caused by unlawful agency practices. *Perales v. Thornburgh*, 967 F.2d 798, 815 (2nd Cir. 1992) (finding INS regulations invalid under IRCA, and setting new deadline for legalization applicants and ordering the INS to reopen files); *Proyecto San Pablo v. INS*, 784 F.Supp. 738, 748-49 (D.Ariz.1991) (ordering agency to reopen applications of those wrongfully denied legalization as a consequence of agency policy found invalid under IRCA); *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. at 880-81 (ordering the INS to vacate denials and reconsider applications). We do not find that the district court exceeded the scope of its authority in fashioning injunctive relief for category three nonimmigrants.

The district court granted injunctive relief in favor of plaintiffs for several reasons. First, the district court was persuaded that the policy change announced in *Matter of N* was applied unevenly. The court also noted that *Matter of N* may not provide a remedy for those category three nonimmigrants already prejudiced by the old policy. Finally, the court rejected INS arguments that court-ordered relief was unnecessary because category three nonimmigrants could request reconsideration of their applications

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[34] In addition, the INS reasserts its jurisdictional objections while disputing the scope of the district court's authority to grant equitable relief. As we noted in Part I, both the Supreme Court and our own circuit have held that federal courts have jurisdiction to hear broad statutory and constitutional challenges to INS regulations promulgated under certain provisions of IRCA.

and because the agency could reopen cases on its own initiative.

The district court properly rejected these arguments. Even if we agree with the INS that its current procedure would permit applicants to request that the agency reconsider applications if they were wrongfully denied,[35] we are not convinced that this procedure provides an adequate remedy.

The district court found agency procedures for reopening legalization applicants' files "incomprehensible," particularly for the majority of applicants who are not represented by counsel. *See Immigration Assistance I*, 709 F.Supp. at 1004. Plaintiffs also point out that many applicants will be unaware of the change in INS policy and procedures resulting from *Matter of N* and their implications. We agree with the district court that the burden of the agency's own invalid policies should not fall on individuals whose applications for legalization were wrongfully denied.[36]

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[35] It is not clear that category three nonimmigrants may request that the INS reconsider their applications for legislation. The INS argues that its decision in *Matter of O*, 19 I. & N. Dec. 871 (1989) sets precedent that would allow category three applicants to make such a request. But as they currently exist, INS regulations do not themselves permit applications to move for reconsideration. Rather, INS regulations provide that sua sponte review by the agency is purely discretionary and informal. *See* 8 C.F.R. §§ 103.5(b), 245a.2(q) (1992).

[36] Plaintiffs have also asked us on appeal to order the INS to grant stays of deportation and issue temporary work permits to category three applicants who were wrongly denied legalization. The motion was presented in district court, but the merits were not decided on. On remand, the district court will have the opportunity to deal with plaintiffs' motion.

Finally, the INS argues on appeal that category three applicants are not entitled to injunctive relief if they failed to file administrative appeals to challenge the agency's wrongful denial of their application for legalization. The agency relies on *Pittston Coal Group v. Sebben*, 488 U.S. 105, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988) to support its position.

The agency's reliance on *Sebben* is misplaced. The Supreme Court's decision in *Sebben* initially petitioned the district court for a writ of mandamus. The Court held that such relief was inappropriate. The Court emphasized the extraordinary nature of mandamus and concluded that it would order such relief only to compel performance of a "clear nondiscretionary duty." *Sebben*, 488 U.S. at 121, 109 S.C. at 424. By contrast, plaintiffs in the present case were awarded only declaratory and injunctive relief. Second, the Court in *Sebben* stressed that respondents would have been vindicated had they pursued administrative and judicial remedies. *Sebben*, 488 U.S. at 123, 109 S.Ct. at 424. In the present case, category three applicants who were wrongly denied legalization had slim prospects of winning an administrative appeal before the INS decided *Matter of N.*

Third, the Court's opinion in *Sebben* rested primarily on principles of res judicata. That principle is not operative in the present case. In *Sebben*, petitioners' failure to pursue administrative and judicial remedies made the agency's decision against them a final determination. In such cases, the agency's decision should bind individuals who fail to pursue their statutory remedies. By contrast, INS rulings on individual applications are not final determinations. For example, any applicant denied legalization may

still seek review of a deportation order in federal circuit court. 8 U.S.C. §§ 1105a, 1255a(f)(4) (1988). Consequently, failure to follow prescribed administrative appeal procedures should not have the same preclusive effect.

Contrary to the agency's argument, *Sebben* does not preclude relief for category three applicants who were wrongly denied legalization but failed to appeal the agency's decision. The injunctive relief issued by the district court for category three applicants should apply to all individuals in this category whether or not they appealed the agency's decision.

VI. Injunctive Relief Applicable to All Categories

A. *Extension of Application Deadline*

Plaintiffs asked the district court to establish new application deadlines [37] for all three categories of nonimmigrants who did not file for legalization because they believed or were told that they were ineligible based on INS regulations that the district court later found invalid. The district court held that the Supreme Court's decision in *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), precluded such relief.

On appeal, plaintiffs maintain that *Pangilinan* is distinguishable and that the district court has equitable power to extend application deadlines for nonimmigrants who were discouraged from applying for legalization by INS regulations.

We considered the question of the district court's authority to extend INS application deadlines for

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[37] The original application period began on May 5, 1987 and ended on May 4, 1988. 8 C.F.R. § 245.2(a) (1988).

legalization under IRCA in our recent decision in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d at 921-23. In that case, we held that the district court had authority to extend INS deadlines. We noted that extending the deadline was consistent with congress's intent and distinguished the Supreme Court's decision in *Pangilinan*.[38] *Catholic Social Services*, 956 F.2d at 921-23. In particular, we emphasized that the statutory scheme considered in *Pangilinan* differed significantly from IRCA. *See Catholic Social Services*, 956 F.2d at 921-22.[39] Our recent decision in *Zambrano v. INS*, 972 F.2d at 1124-25, followed *Catholic Social Services*, and affirmed the district court's authority to extend application deadlines for legalization under certain provisions of IRCA.

The district court's authority to extend application deadlines in the present case is controlled by our decisions in *Catholic Social Services* and *Zambrano*. We therefore remand to the district court to reconsider plaintiffs' request for an extension of application deadlines in light of those decisions.[40]

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[38] In *Pangilinan*, 486 U.S. at 883-85, 108 S.Ct. at 2215-17, the Supreme Court held that federal courts do not have authority to extend deadlines for naturalization applicants under sections 701-705 of the Nationality Act of 1940, 8 U.S.C. §§ 1001-05 (Supp. V 1940).

[39] We noted in *Catholic Social Services*, 956 F.2d at 921-22, that *Pangilinan* involved Congress's exclusive right under the federal constitution to grant naturalization. Furthermore, we noted that a court-ordered deadline was not consistent with Congress's intent underlying the 1940 Act.

[40] Because we conclude that the district court has authority to set a new application deadline, we need not reach plaintiffs' contentions on the issues of individual standing and class certification. The district court dismissed the indi-

B. *Readmittance into the United States of Wrongfully Deported Nonimmigrants*

Plaintiffs argue on appeal that the district court erred when it denied their request for an injunction ordering the INS to readmit nonimmigrants whose applications were wrongfully denied, and who were consequently deported, because of INS regulations now held to be invalid. We recognize that some courts have issued similar relief. *See, e.g., Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir.1990) (alien deported following criminal conviction may re-enter the country after the conviction was vacated); *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir.1977) (alien deported in proceeding which violated due process may re-enter country and reopen deportation proceeding). In the present case, however, plaintiffs have not sufficiently identified applicants in any of the three categories who are living outside the United States because they were wrongfully expelled. *See Catholic Social Services*, 956 F.2d at 923 (plaintiffs' parole request denied when they failed to identify any class member who qualified for exception to general rule that courts may not review deportation orders of those who have departed United States). Under these circumstances, we cannot conclude that the district

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vidual plaintiffs on standing grounds on the assumption that the court had no authority to set a new application deadline. Similarly, the issue of class certification turns on the question whether the individual plaintiffs have standing in the first place. Because we conclude that the district court has authority to set a new application deadline, we leave any outstanding issues regarding individual plaintiffs for the district court to resolve.

court erred in denying the injunction requested by plaintiffs.

CONCLUSION

For the reasons stated above, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C88-379R

IMMIGRATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR, ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO DISMISS

[Entered Mar. 8, 1989]

THIS MATTER comes before the court on plaintiffs' motion for summary judgment and defendants' second motion to dismiss or in the alternative for summary judgment. Having reviewed the motions, together with all documents filed in support and in

opposition, and being fully advised, the court finds and rules as follows:

I. FACTS

On November 4, 1988, this court granted in part and denied in part defendant Immigration and Naturalization Service's ("INS") motion to dismiss. *See* Order Granting In Part and Denying In Part Defendants' motion to Dismiss ("Order"). The court dismissed plaintiffs' claim for an extension of the deadline for legalization applications under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a, as well as those claims decided in *Ayuda, et. al. v. Meese, et. al,* 687 F.Supp. 650 (D.D.C. 1988) that the INS did not appeal.

In addition, the court ruled that since plaintiffs' amended complaint failed to allege that the individual named plaintiffs submitted timely applications for legalization, these individual plaintiffs lacked standing. In a companion order, the court denied plaintiffs' motion for class certification. *See* Order Denying Plaintiffs' Motion for Provisional Class Certification.

The court did not dismiss the suit, ruling instead that the various organizational plaintiffs had standing in their own right to seek relief from the INS's regulations and practices. The court held that it had jurisdiction over plaintiffs' amended complaint and that plaintiffs' claims were ripe for adjudication, but questions of fact precluded summary judgment. The parties have subsequently taken depositions and exchanged discovery materials. Plaintiffs now move for summary judgment, and defendants move to dismiss or in the alternative for summary judgment.

II. DISCUSSION

A. *Standard For Summary Judgment*

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d. 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by the moving party is possible under the facts and applicable law." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981).

B. *Background*

To define the eligibility of nonimmigrants for legalization, Congress adopted 8 U.S.C. § 1255a(a)(2)(B), which provides that:

> [i]n the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

8 U.S.C. § 1255a(a)(2)(B). The United States District Court for the District of Columbia in *Ayuda v. Meese* rejected the INS's restrictive definition of the phrase "known to the Government". *Ayuda*, 687 F.Supp. at 660-66.

The *Ayuda* court held that to prove an alien's unlawful status was known to the government,

> a nonimmigrant alien must establish that prior to January 1, 1982, documentation existed in one or more government agencies so that such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful.

Id. at 666 (supplemental order). Plaintiffs here challenge the INS's application of the *Ayuda* standard to three categories of applicants and as a consequence, plaintiffs' arguments present technical variations on the issues first discussed in *Ayuda*.

C. *Section 265 Applicants*

Prior to 1982, section 265 of the Immigration and Naturalization Act required all aliens residing temporarily in the United States to report their addresses to the INS each quarter or each year. *See* 8 U.S.C. § 1305. If an alien willfully failed to register his or her address, the INS could seek criminal penalties as well as deportation. In its prior order, this court held that violations of section 265 were not merely technical, but rather made an alien's status unlawful and therefore eligible for legalization under the "known to the government" standard.[1] *See* Order at 17; *Ayuda*, 687 F.Supp. at 668 (supplemental order V).

Plaintiffs contend that in spite of this and other courts' rulings, the INS refuses to approve section

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[1] However, questions of fact concerning the INS's records of section 265 violations precluded summary judgment.

265 applicants. The INS, according to plaintiffs, gives the formal explanation that it is holding these applications in abeyance while litigation continues. *See* Deposition of Terrance O'Reilly at A2, exhibit A to Plaintiffs' Reply Memorandum in Support of Summary Judgment. Informally, however, INS agents have allegedly told the directors of various plaintiff organizations that section 265 applications will be denied. *See* Plaintiffs' Memorandum in Opposition at 4.

In response, the INS contends that it has no such policy. The previous stance of the INS, that violations of section 265 were technical and did not entitle an alien to legalization, was a "litigation position" which the INS has abandoned. The INS does not contest that it is holding section 265 applications in abeyance, arguing instead that it has decided to process these applications case-by-case. Finally, the INS renews its objection to judicial review on the grounds that the legal issue is not ripe.

This court affirms its prior ruling that violations of section 265 create unlawful status and therefore qualify for consideration under the "known to the government" standard. To the extent that case-by-case determinations might permit an INS adjudicator to rule that section 265 violations, as a matter of law, do not create unlawful status, this would allow legal error. Since the INS has applied this "litigation position" to actual cases in the past, the court finds the possibility of erroneous denial substantial enough to warrant summary judgment here. Therefore, the court grants plaintiffs' request for declaratory relief and holds that violations of section

265 create unlawful status for purposes of eligibility for legalization.[2]

However, the court shall not, at this time, grant plaintiffs' request for injunctive relief requiring the INS to process section 265 applications. Since the outcome of the *Ayuda* appeal and other litigation may affect the status of these applications, this court withholds entry of such an order. Therefore, the court retains jurisdiction over plaintiffs' first claim.

D. *Category 2 Applicants*

In § 1255a(a)(2)(B), Congress described two classes of nonimmigrants eligible for legalization.

> [T]he alien must establish that the alien's period of authorized stay expired before such date *through the passage of time* or the alien's *unlawful status was known to the government* as of such date.

§ 1255a(a)(2)(B) (emphasis added). The INS has applied this distinction to applicants who violated duration of status ("d/s") visas, dividing them into two categories. The first category includes students admitted under an d/s F visa who remain in the United States after they graduate. In legalization wire number 26, the INS instructed its examiners to classify graduated students with F visas under the "passage of time" standard, exempting these appli-

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[2] Plaintiffs in their Memorandum in Support of Summary Judgment explain in detail the INS's records and procedures. The INS does not dispute plaintiffs' description, and as a result, the questions of fact which prevented summary judgment on this claim no longer exist. Instead, the controversy has shifted to whether the court may appropriately enter judgment and if so, what form that judgment should take.

cants from proving their unlawful status was known to the government. *See* Legalization Wire Number 26, exhibit 20 to Plaintiffs' Memorandum in Support of Summary Judgment.

For those students who violated their d/s visas by not fulfilling some condition of the visa, failing to take the required number of class hours for example, the INS categorizes these applications under the "known to the government" standard. *See* 8 U.S.C. § 1255a(a)(2)(B); *Ayuda*, 687 F.2d at 666 (Supplemental Order). Plaintiffs contend that by judging these applications under the "known to the government" test, the INS imposes a greater quantum of proof on the applicants without a rational basis for doing so, and consequently violates the equal protection guarantee of the Fifth Amendment.

The INS acknowledges that it categorizes applicants under the "passage of time" and "known to the government" provisions, but denies that this distinction violates the equal protection guarantee. First, the INS contends that the distinction is rational given the language of § 1255a(a)(2)(B). Using again the example of a student with a d/s F visa, when the student enters the United States to study, the INS authorizes the student to stay lawfully in the United States for a definite period. This is the duration of the student lawful status. If the student stays beyond this period, the student's status becomes unlawful solely by the passage of time.

On the other hand, if the student fails to meet a condition of the visa, taking the required amount of course hours, the period of authorized stay has not expired—that period would end sometime after graduation. Instead, the student has created unlaw-

ful status before the duration of lawful status was scheduled to end. The INS contends that its discrimination between these two types of unlawful status merely follows the distinction drawn by Congress in IRCA.

Second, the INS argues that in practice, the standard of proof between the two categories does not differ, and only case-by-case adjudication within the agency will define the ultimate standards. The INS argues again that contrary to plaintiffs' allegations, it does not have a concrete policy to deny legalization to plaintiffs' subclass of applicants.

INS regulations clearly create two classes of applicants. In 8 CFR § 245.2(b)(11)-(12), the INS singles out as eligible for legalization, nonimmigrants with duration of status visas in one of three classes: A (foreign government employees and family), G (representatives of international organizations and family), and F (students who have completed a full course of study). Nonimmigrants with H (temporary employees), L (intracompany transfers), and F visas who do not graduate are eligible for legalization under 8 CFR § 245a.2(b)(3), the "known to the government" standard. Congress in IRCA made no similar distinctions among types of visas.

The court finds that this distinction between applicants is not, as the INS contends, purely a matter of definition, but rather adds an additional element of proof for H, L and non-graduating F visa applicants. These applicants must prove not only that they violated the conditions of their visa, but also that the government had constructive or actual notice of their unlawful status. A non-graduating F visa applicant, for example, must document that,

> the said school forwarded to the [INS] a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the Service the aforementioned report and that the school no longer has copies of the actual documentation sent.

8 CFR § 245a.1(d)(4) (amended June 22, 1988).

In contrast, a graduated F visa applicant must prove that his or her authorized admission expired through the passage of time, not that the government had actual or constructive notice of the unlawful status. *See* 52 Fed. Reg. 43843, exhibit 2 to Plaintiffs' Memorandum in Reply; Legalization Wire #26, *supra*. Moreover, A and G aliens,

> will be considered eligible . . . if the qualifying employment terminated prior to January 1, 1982 or the Department of State acknowledges that the alien's A or G status recognition ceased prior to January 1, 1982 and the alien is otherwise eligible for legalization.

52 Fed. Reg. 43843.

The court finds that the INS has created an irrational distinction among legalization applicants. Prior to 1982, a d/s F visa had no specific expiration date—the visa was valid "for the duration of status in the United States as a student." 8 CFR § 214.2(f)(5) (1981). Graduation, like failing to attend school, ended the student's lawful status. Furthermore, the distinction between A, G, and graduated F visa applicants on the one hand, and H, L, and non-graduating F visa applicants makes no sense.

The court finds no rational difference between a student who drops out of school and an embassy employee who quits work. Both have presumably violated a term of their visas, yet for the embassy employee, the INS considers the unlawful status to occur through the passage of time.

The court finds, accordingly, that the INS's irrational classification violates the equal protection guarantee. *See Sudomir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir. 1985) (federal classifications valid unless wholly irrational). Since the court also finds no genuine issues of material fact concerning INS regulations, it grants summary judgment to plaintiffs on this issue. Furthermore, the court grants plaintiffs' request to create a rebuttable presumption that an applicant's violation of his or her visa, regardless of type, was known to the government if at the time of the violation, INS regulations or policy required the applicant's school or employer to report the violation. With this presumption, the evidentiary burdens on all nonimmigrants, as well as the INS's ability to challenge an application, are equivalent.

E. *Category 3 Applicants*

The dispute over this final category of applicants centers on a recent decision by the Legalization Appeals Unit ("LAU"), the final level of administrative appeals for legalization applicants, in *Matter of N*. *See* Exhibit A to Defendants' Memorandum in Opposition. Plaintiffs have alleged that the INS denies legalization to aliens who, by misrepresentation or mistake, are incorrectly reinstated to lawful status sometime after January 1, 1982. In *Matter of N*,

the LAU ruled in favor of an applicant in plaintiffs' third category.

> [A]n alien who obtains reinstatement as a non-immigrant subsequent to January 1, 1982, and who otherwise meets the continuous unlawful residence requirement, is eligible for temporary resident status if the reinstatement was obtained by the misrepresentation of material facts.

Id. The INS represents that this ruling[3] serves as precedent for future decisions by the LAU and therefore, the INS has no policy to deny legalization to applicants who were incorrectly reinstated to lawful status.

Plaintiffs assail the INS's position on two grounds: first, contrary to the INS's representations, the LAU and Regional Processing Facilities have not followed *Matter of N* as the law. Plaintiffs submit portions of eight INS denials which plaintiffs allege show the LAU's non-compliance. *See* Exhibit 5 to Plaintiffs' Supplemental Authorities. Second, *Matter of N* does nothing for those applicants previously denied.

In its briefs, the INS appears to agree that *Matter of N* and *Matter of S* are correct and will serve as precedents. However, plaintiffs point to INS decisions which do not conform to these rulings as well as non-committal language in the INS's briefs. To resolve any ambiguity in the issue, this court rules as

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[3] The INS also submits *Matter of S* as a precedent decision. In *Matter of S*, the LAU concluded that since the applicant obtained an entry visa by fraud, her status subsequent to that entry has been unlawful. *See Matter of S*, Attachment A to Defendants' Supplemental Authorities.

follows: *Matter of N* is the correct legal ruling. If an applicant, in unlawful status prior to January 1, 1982 obtains reinstatement to lawful status through fraud, misrepresentation, or mistake, the applicant nonetheless remained in an unlawful status. As the LAU stated in *Matter of S*, "admission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not merely procedural regularity." *Matter of S*, attachment A to Defendants' Supplemental Authorities.

The court also finds justification for requiring the INS to reopen category 3 cases denied prior to *Matter of N*. As with previous federal courts addressing the INS's legal errors, this court has both the jurisdiction and authority to order the reopening of erroneous denials. *See Ayuda*, 687 F.Supp. 650, 668 (D.D.C. 1988). Furthermore, the INS's proposed remedy for erroneous denials—*sua sponte* reopening—fails to guarantee adequate review. *See* 8 CFR § 103.5. Under INS regulations, an applicant or attorney cannot move for reconsideration, nor does the applicant have any right to review. Section 103.5 makes review purely discretionary and informal. This procedure is likely to prove incomprehensible to most denied applicants, many of whom do not have legal counsel.

Therefore, the court orders the INS to reopen all cases decided prior to and contrary to *Matter of N*. To expedite reopening, plaintiffs shall search their files for cases eligible for review and notify the INS of all cases which may comply.

F. *Ripeness and Standing* [4]

The INS renews its arguments that the plaintiff organizations do not have standing to sue and that plaintiffs' claims are not ripe. As to standing, the court finds that even though the deadline for applications has passed, the plaintiff organizations must still expend time and money to guide applicants through the administrative process. Moreover, the failure of the INS to decide entire categories of cases (like section 265 violations) or to adopt a uniform policy perceptibly impairs the plaintiff organizations' goals and drains their resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The court finds no grounds to reconsider its earlier finding that plaintiffs have standing to sue.

The court also rejects the INS's contention that plaintiffs' claims are not ripe. As the court discusses above, INS policy is sufficiently concrete to permit ruling on the legality of INS policy and regulations. The court's ruling today only establishes legal standards which the INS must follow if it does not already do so. The court expresses no opinion on the ultimate eligibility of a particular applicant, but rather leaves case-by-case review of eligibility to the INS. There-

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[4] Defendants also seek dismissal for plaintiffs' failure to produce all discovery that defendants request. The court finds dismissal too harsh a sanction and denies defendants' motion. However, plaintiffs do not contest the dismissal of five plaintiff organizations: American G.I. Forum, United California Mexican American Association, African Community and Information Center, Chinese American Citizens Alliance, and the Coalition for Humane Immigration Reform of Los Angeles. Accordingly, the court DISMISSES these five plaintiff organizations.

fore, the INS's concern that this court's jurisdiction over plaintiffs' claims will interfere with the agency's statutory right to decide eligibility is unwarranted.

THEREFORE, plaintiffs' motion for summary judgment is GRANTED as to declaratory relief for applicants in categories 1-3. The INS is ordered to reopen all category 3 applications denied on grounds contrary to the legal ruling in *Matter of N.* The plaintiff organizations American G.I. Forum, United California Mexican American Association, African Community and Information Center, Chinese American Citizens Alliance, and the Coalition for Humane Immigration Reform of Los Angeles are DISMISSED from this matter. Defendants' second motion to dismiss or in the alternative for summary judgment is DENIED.

DATED at Seattle, Washington this 6th day of March, 1989.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C88-379R

IMMIGRATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO), ET AL., PLAINTIFFS

v.

IMMIGRATION AND NATURALIZATION SERVICES, ET AL., DEFENDANTS

[Filed June 8, 1989]

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO AMEND JUDGMENT

THIS MATTER comes before the court on plaintiffs' motion to amend judgment. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

For the third time, this court reviews various challenges to the Immigration and Naturalization Service's ("INS") implementation of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a *et seq.* Plaintiffs, a group of organizations which assist documented and undocumented aliens, seek both declaratory and injunctive relief against the INS's administration of the legalization provisions of IRCA. On November 4, 1988, this court granted in part and denied in part the INS's motion to dismiss. *See* Order Granting In Part and Denying In Part Defendants' Motion to Dismiss ("first order"). The court dismissed plaintiffs' claim for an extension of the deadline for legalization applications under IRCA, as well as those claims decided in *Ayuda, et al. v. Meese et al.*, 687 F.Supp. 650 (D.D.C. 1988) that the INS did not appeal.

In addition, since plaintiffs' amended complaint failed to allege that the individual named plaintiffs submitted timely applications for legalization, the court ruled that these individual plaintiffs lacked standing. In a companion order, the court denied plaintiffs' motion for class certification. *See* Order Denying Plaintiffs' Motion for Provisional Class Certification ("certification order").

The court did not dismiss the suit, however, ruling instead that the various organizational plaintiffs had standing in their own right to seek relief from the INS's regulations and practices. On March 8, 1989, this court granted in part plaintiffs' motion for summary judgment and denied defendants' motion to dismiss. *See* Order Granting In Part Plaintiffs' Motion For Summary Judgment and Denying Defend-

ants' Motion to Dismiss ("second order"). The court granted relief on three categories of legalization applications.

First, the court entered a declaratory judgment that a non-immigrant's violation of the address reporting requirement ("section 265 applicants") created unlawful status and therefore qualified the non-immigrant for legalization under IRCA's "known to the government" standard. *See* 1255a(a)(2)(B). The court refused, however, to order the INS to rule on section 265 applications. Currently, the INS is holding these applications in abeyance.

Second, the court held as irrational the INS's distinction between applicants with duration of status visa who qualified under the INS's "passage of time" standard and those who qualified under the "known to the government" standard. The court found that this distinction placed an addition [*sic*] element of proof on certain applicants without a rational basis for doing so. Finally, third, the court ordered the INS to reopen all cases decided contrary to the Legalization Appeals Unit's ("LAU") decision in *Matter of N. See* Exhibit A to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. On March 17, 1989, the parties in a telephone conference with the court decided that a trial was unnecessary in this matter.[1] Instead, plaintiffs ob-

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[1] The INS, for reasons that are unclear to the court, object [*sic*] to the use of "admitted facts" contained in the parties' pre-trial order. The INS argues that it agreed to these facts only for the purposes of trial, not summary judgment. Plaintiffs, on the other hand, seek to have the admitted facts made part of the record. The court finds that the admitted facts are just that—facts that both parties agree are true. Had the

tained leave from the court to file a motion to clarify the court's judgment in its second order.[2] Plaintiffs now move for such an order clarifying this court's prior judgments.

II. DISCUSSION

A. ISSUES PREVIOUSLY DECIDED

Plaintiffs seek reconsideration of two prior rulings by the court. First, plaintiffs contend that the court should certify this case as a class action in order to avoid confusion over the scope of the court's orders and insure that those who should benefit from the court's rulings actually do so. In response, the INS argues that plaintiffs request for class certification was, and is, untimely, and furthermore, that certifying the class would require plaintiffs to amend their complaint and substantially change the character of this suit.

The court finds no grounds to reconsider its refusal to certify the class. The court denied plaintiffs' motion for two reasons: it was late under the local rules

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INS intended not to contest these facts at trial, it should have entered them in the pretrial order as facts not admitted but not contested. The courts sees no reason, however, to allow either party to contest facts which they have previously admitted to the court as true.

[2] The INS characterizes plaintiffs' motion as a motion to amend judgment under Fed. R. Civ. P. 59, and argues that it is untimely under the 10-day time limit. The court is unpersuaded. Rule 59 applies after the court enters final judgment on particular claims, something which has not yet happened here. *See* Fed. R. Civ. P. 54(b). Furthermore, plaintiffs did obtain leave within 10 days of entry of the court's second order to file the present motion to amend judgment.

and plaintiffs failed to allege that the individual class representatives had filed timely applications for legalization. For this second reason, the court concluded that named plaintiffs' claims were not typical of those of the entire class.

Plaintiffs argue that their failure to move for class certification within 90 days was harmless error, far outweighed by the need to certify the class in order to grant nationwide relief. Plaintiffs note correctly that in most cases, violation of the local rule's 90-day time limit does not warrant dismissal of all class claims. *See Slania v. William Penn Parking Corp.*, 106 F.R.D. 419 (W.D.Pa. 1984). However, plaintiffs also failed to satisfy the requirement of typicality under Fed. R. Civ. P. 23, and absent yet another amended complaint and subsequent discovery by defendants, plaintiffs cannot remedy this defect. The court finds that certifying a class, with the necessary prerequisite of discovery and subsequent motions, would unduly complicate this action with no appreciable benefits.

The court concludes further that the injunctive relief discussed below is sufficiently clear both in scope and application to make class certification unnecessary. The Ninth Circuit, in *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987), recently approved an injunction against a federal agency, there the Department of Labor, that affected enforcement of a federal program nationwide.

> Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown. On the other hand, an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if

> it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*

Bresgal v. Brock, 843 F.2d at 1170 (emphasis original). So long as the agency is a party to the suit, as the INS is here, a district court may enjoin a federal agency and in effect order nationwide compliance if such injunctive relief is both appropriate and necessary. *Bresgal*, 843 F.2d at 1171 (district court has power to order nationwide relief when it is required). Thus, this court need not certify plaintiffs' class to accomplish the same end.

Next, plaintiffs seek reconsideration of this court's decision not to extend the deadline for legalization applications and request the court to retain jurisdiction to consider relief for potential applicants deterred by the INS. *See* First Order at 15-16. In its first order, the court concluded that it had no authority either at law or in equity to extend the limit for filing applications, citing the United States Supreme Court's opinion in *INS v. Pangilinan*, —— U.S. ——, 108 S.Ct. 2210 (1988). Plaintiffs contend that a recent decision from the D.C. Circuit as well as pending appeals in the Ninth Circuit, justify this court retaining jurisdiction over claims that the INS denied applicants a reasonable opportunity to file for legalization or that an applicant "constructively filed" an application. *See In Re Thornburgh*, No. 88-5360, slip op. at 19 (D.C. Cir. March 3, 1989).

Plaintiffs' argument has two strands: first, plaintiffs directly challenge the court's earlier ruling that *Pangilinan* curbs any consideration of late applications. On this point the court shall not alter its prior decision. Although *In re Thornburgh* supports plain-

tiffs' assertions, the D.C. Circuit issued that opinion on a writ of mandamus, concluding that Judge Sporkin's appointment of a Special Master in *Ayuda* was not illegal. *See In re Thornburgh*, slip op. at 8.

Thus, the case has limited bearing here, where the issue has always been whether potential applicants have a legal right to relief. Given that IRCA expressly prohibits review of late filings and that the Supreme Court in *Pangilinan* prohibited the use of estoppel or equitable powers to extend application deadlines, the court finds no grounds to consider its earlier ruling. *See* 8 U.S.C. § 1255a(f)(2); *Agcaoili v. Gustafson*, No. 86-5830, slip op. at 2017-2018 (9th Cir. 1989) (*Pangilinan* foreclosed all claims for naturalization). This court has no authority to extend the period for applications under IRCA.

The court also rejects the second strand to plaintiffs' argument. Plaintiffs contend that relief other than acceptance of late applications may be available and that the court should retain jurisdiction to consider these alternate forms of relief. *See In re Thornburgh*, slip op. at 28 (Special Masters in *Ayuda* appointed to study lesser forms of relief). Yet plaintiffs do not make specific requests, but rather ask the court to retain jurisdiction in case alternate forms of relief appear in the future. The court is unwilling to retain jurisdiction on such speculative grounds and therefore denies plaintiffs' request.

B. CATEGORY 1 APPLICANTS—SECTION 265

Plaintiffs seek relief for section 265 applicants additional to the court's declaratory judgment in their favor. First, plaintiffs request that the court re-

quire the INS to adjudicate these applications within three months. Second, if it is unable to process an application within three months, the INS, according to plaintiffs, should notify the applicant of this court's ruling as well as grant extended work authorization, broader travel permits, and deferred deportation of spouses and children under the family fairness policy. Finally, plaintiffs seek to define more clearly the burden of proof for this category of applicants.

The court once again refuses to order the INS to adjudicate these applications within three months. *See* Second Order at 5. The court is reluctant to interfere with the INS's timing of agency review. Instead, the court has attempted to structure its orders to clarify the legal standards for legalization, while leaving case-by-case adjudication to the INS. As the Ninth Circuit held in similar circumstances,

> an injunction against a government agency must be structured to take account the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs . . . The manner in which the Secretary implements the court's order to enforce the Act is, in the first instance, a matter of agency discretion.

Bresgal, 843 F.2d at 1171. Therefore, the court affirms its earlier decision not to order the INS to process these applications.

The court agrees, however, that some form of notice is necessary for this category of applicants, if the INS is unable to adjudicate these cases. If the INS holds an application in abeyance for more than 90 days from the entry of this order, it must notify the

applicant of: (1) this court's ruling that section 265 violations may qualify the applicant for legalization, (2) the change of address procedure and its importance, along with a change of address card, (3) the existence of and application procedures for both the family fairness policy and the provisions for travel abroad, and (4) the nearest INS office that renews work authorization forms.

Although plaintiffs request more liberal treatment for section 265 applicants, particularly for travel, work authorization, and family fairness benefits, the court concurs with the INS that this additional relief goes beyond the scope of this suit. Furthermore, plaintiffs raise these issues for the first time and the court shall not grant such special treatment solely on the record as it stands—incomplete and inconclusive.

Finally, plaintiffs request the court to clarify the burdens of proof of section 265 applicants. As discussed in the first and second orders, an applicant must prove that "documentation existed in one or more government agencies so that . . . such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful." *Ayuda*, 687 F. Supp. at 666; First Order at 4; Second Order at 6. IRCA requires the applicant to prove eligibility for legalization, and therefore, the burden of persuasion on this point always rests with the section 265 applicant.

However, given the nature of a section 265 violation—the nonimmigrant failed to report his or her address to the INS—an applicant could rarely if ever provide conclusive evidence that the INS "knew" of the violation. That information is with the INS. Thus, the burden of proof at some point should shift

to the INS, namely that the INS had no knowledge of the alleged violation. The burden of proof shifts as follows: an applicant must make a prima facie showing that he or she violated the address reporting requirements either by failing to report the address or submitting a false address.

Once the applicant makes such a showing, the INS then has the burden of coming forward with proof that the alleged violation and subsequent unlawful status was not known to the government.[3] If the INS does come forward with such evidence, the applicant must then show by a preponderance of the evidence that he or she was in unlawful status and that this unlawful status was known to the government. At all times, the applicant carries the burden of persuasion to prove eligibility for legalization.

C. CATEGORY 2—VIOLATIONS OF DURATION OF STATUS VISAS

Plaintiffs request the court to apply retroactively its declaratory judgment on this category of applications, specifically to require the INS to reopen all denials of F, H, and L-visa applications within 90 days. In its second order, the court invalidated the INS's policy of treating these applicants differently, but did not discuss the scope of its ruling. *See* Second Order at 6. After considering the merits of retroactive relief, the court concludes that its ruling shall not apply retroactively to this category of applicants. The INS's former policy did not preclude legaliza-

[3] In effect, credible evidence of a violation of section 265 prior to 1982 creates a rebuttable presumption that the INS knew of the violation.

tion, but rather created a presumption in favor of applicants holding certain types of visas. The court finds that prospective relief—invalidating the distinction between types of visas—redresses the harm that plaintiffs have proven.[4]

Plaintiffs also ask that the court to refine the burden of proof for category 2 applicants. The court will do so in the same manner as it did for applicants in category 1. Applicants in category 2 must make a prima facie showing that they violated the terms of their duration of status visa. Once this is shown, the INS then has the burden to come forward with evidence either that unlawful status did not occur through the passage of time or that the unlawful status was not known to the government. If the INS comes forward with this evidence, the applicants must show by a preponderance of the evidence that they are eligible for legalization under either the "passage of time" or "known to the government" standards. The applicants always have the burden of persuasion on this point.

D. CATEGORY 3—REOPENED CASES

Plaintiffs request special consideration for category 3 applicants as for those in category 1: more liberal travel provisions, work authorization, and family fairness benefits as well as notice of the court's orders and available benefits. The court rules that if the INS fails to reopen category 3 denials within 90 days, it shall provide to applicants the notice set forth *supra*.

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[4] As a result, the court does not reach the issue of paroling denied applicants back into the United States for rehearing.

E. RETAINING JURISDICTION

To ensure compliance with its orders, the court shall retain jurisdiction over this matter for six months. After that, the court will entertain a motion for entry of final judgment on plaintiffs' claims if the parties satisfy the terms of the court's orders.

THEREFORE, plaintiffs' motion to amend judgment is GRANTED IN PART and DENIED IN PART.

DATED at Seattle, Washington this 6th day of June, 1989.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-35345

D.C. No. CV-88-379-R

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS-APPELLEES,

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, Commissioner, INS; EDWIN MEESE, U.S. Attorney General; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

No. 89-35593

D.C. No. CV-88-379-BJR

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS-APPELLEES,

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, Commissioner, INS; EDWIN MEESE, U.S. Attorney General; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

No. 89-35613

D.C. No. CV-88-379-BJR

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO; AFRICAN COMMUNITY AND INFORMATION CENTER, INC.; AMERICAN G.I. FORUM; COALITION FOR FAIR IMMIGRATION REFORM, LOS AN-

GELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO); INTERNATIONAL INSTITUTE (EAST BAY); CHINESE AMERICAN CITIZENS ALLIANCE, PLAINTIFFS

and

COALITION FOR FAIR IMMIGRATION REFORM, LOS ANGELES; HERMANDAD MEXICANA NACIONAL; ONE STOP IMMIGRATION; INTERNATIONAL INSTITUTE (SAN FRANCISCO), ET AL., PLAINTIFFS-APPELLANTS

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, Commissioner, INS; EDWIN MEESE, U.S. Attorney General; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

No. 89-35706

D.C. No. CV-88-379-BJR

LEGALIZATION ASSISTANCE PROJECT OF THE LOS ANGELES COUNTY FEDERATION OF LABOR (AFL-CIO); UNITED CALIFORNIA MEXICAN-AMERICAN ASSOCIATION; TRAVELERS AND IMMIGRANTS AID OF CHICAGO, PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE; ALAN C. NELSON, Commissioner, INS; EDWIN MEESE, U.S. Attorney General; U.S. DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

[Filed Feb. 10, 1993]

ORDER

Before: FARRIS, PREGERSON, and FERGUSON, Circuit Judges

The panel as constituted above has voted to deny the petition for hearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence.

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order

An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application

Each application under this subsection shall contain such information as the Attorney General may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors

If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien

must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he—

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(D) is registered or registering under the Military Selective Service Act [50 App. U.S.C. 451 et seq.], if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1522 note] shall be considered to have entered the United States and to be in an unlawful status in the United States.

* * * * *

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court

of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in pargraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate

authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

§ 245a.2 Application for temporary residence.

* * * * *

(b) *Eligibility.* The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

* * * * *

(3) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

* * * * *

(11) A nonimmigrant who entered the United States for duration of status ("D/S") is one of the following classes, A, A-1, A-2, G, G-1, G-2, G-3 or G-4, whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 1, 1982, and who has thereafter continued to reside in the United States in an unlawful status. An alien who was a dependent family member and

who may be otherwise eligible for legalization may be considered a member of this class of eligible aliens if the dependent family member was also in A and G status when the principal A or G alien's status terminated or ceased to be recognized by the Department of State.

(12) A nonimmigrant who entered the United States for duration of status ("D/S") in one of the following classes, F, F-1, or F-2, who completed a full course of study, including practical training and whose time period if any to depart the United States after completion of study expired prior to January 1, 1982 and who has remained in the United States in an unlawful status since that time. A dependent F-2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I-94, Arrival-Departure Record that extended beyond January 1, 1982 is considered eligible if the principal F-1 alien is found eligible.

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